Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 88-790

BERNARD J. TURNOCK, et al., *Appellants*,

v.

RICHARD M. RAGSDALE, et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE HON. CHRISTOPHER H. SMITH, ALAN B. MOLLOHAN, VIN WEBER, ROBERT K. DORNAN, EARL HUTTO, JOHN LaFALCE, VIRGINIA SMITH, BILL EMERSON, HENRY J. HYDE AND GORDON J. HUMPHREY MEMBERS OF THE CONGRESS OF THE UNITED STATES, IN SUPPORT OF APPELLANTS IN TURNOCK AND CROSS-PETITIONERS IN HODGSON

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QUESTION PRESENTED HEREIN

Whether stare decisis, in light of the standards announced in *Patterson v. McLean Credit Union*, prevents reconsideration of *Roe v. Wade*?

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INTEREST OF AMICI[1]

The amici are members of the Congress of the United States. Representatives Christopher H. Smith and Alan B. Mollohan are Co-Chairmen of the Congressional Pro-Life Caucus, an organization of congresspersons who oppose abortion on demand. Representatives Vin Weber and Virginia Smith are members of the United States House of Representatives Appropriations Committee which has jurisdiction over the appropriation of federal funds for the provision of abortion services. Representatives Robert K. Dornan, Earl Hutto, John J. LaFalce, Bill Emerson, and Henry J. Hyde are members of the Congressional Pro-Life Caucus. Senator Gordon J. Humphrey is a member of the Senate Judiciary Committee and the Senate Pro-Life Action Task Force for Women, Children and the Unborn. All support the reconsideration and reversal of *Roe v. Wade* by this Court.

SUMMARY OF ARGUMENT

In *Patterson v. McLean Credit Union*, this Court set out three standards, any one of which, if met, deprive a precedent of stare decisis respect. Your amici argue that *Roe v. Wade* meets all three tests. First, *Roe v. Wade* has been undermined by subsequent changes and development in the law. *Roe* been systematically undermined by its progeny which depart from the limitations expressed in *Roe*. Further, *Webster v. Reproductive Health Services* heralded a new willingness to uphold state laws protective of unborn human life in contrast to the previous extreme hostility to any meaningful regulation of abortion. The decision also demonstrated the disappearance of majority support for the trimester scheme set up in *Roe*, and a change in the standard of review for abortion regulations.

Second, *Roe v. Wade* is a positive detriment to coherence and consistency in the law. *Roe* is an unworkable decision which has

[1] This Brief Amici Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

created inherent confusion in the law because of the use of the trimester medical criteria. It also poses a direct obstacle to the realization of important objectives embodied in other laws in relation to the rights of the unborn in tort law, in wrongful death actions, in equity, in criminal law, and in laws relating to respect.

Third, *Roe v. Wade* is outdated and should be found to be inconsistent with the sense of justice and the social welfare. Examples of this inconsistency include: the rejection of *Roe* in scholarly analysis and political activity; the use of *Roe*, in practice and in law, to justify discrimination against the unborn in general, and those with disabilities in particular; the practice of sex selection abortions; the developments in medicine whereby the fetus is treated as a patient; public opinion in opposition to abortion on demand; and abortion as the exception which swallows all commonly accepted rules of law.

ARGUMENT

I. THE STARE DECISIS STANDARDS FOR RECONSIDERATION OF PRECEDENT ANNOUNCED IN *PATTERSON* ARE FULLY MET.

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution where correction through leglislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fuitful in the sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-410 (1932) (Brandeis, J., dissenting).[2] On almost 90 occassions since *Burnet*, this Court has reviewed and reversed its decisions on constitutional law. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 494-496 (listing 47 constitutional decisions overturned 1960-1979); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying 60 constitutional law decisions among 90 overrulings of prior Supreme Court decisions). The Library of Congress has identified, through 1986, 184 cases in which this Court has reversed its own prior rulings. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987).

Given the importance of stare decisis in the law, it is appropriate that this Court set forth a reliable standard for determining when reconsideration is proper. This was done most recently in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), which stated:

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that "any departure from the doctrine of *stare decisis* demands special justification." We have also said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory constuction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, the legislative power is implicated, and Congress remains free to alter what we have done.

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[2] Justice Brandeis identified 28 instances in which the Court had reversed or qualified its own prior reading of the Constitution. That number has at least tripled in the years since *Burnet*. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467.

Id. at 2370 (emphasis added). Thus, unlike *Patterson*, reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973), involves constitutional interpretation rather than statutory interpretation. The burden borne in establishing the necessity of reconsideration is therefore diminished.

In *Patterson*, this Court set out three standards, any one of which, if met, constitutes sufficient justification to reconsider a judicial precedent. Your amici argue that *Roe v. Wade* meets all three tests and is thus ripe for reconsideration.

The *Patterson* standards are: (1) Whether the precedent has been "undermined by subsequent changes or development in the law;" (2) Whether the precedent is "a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision," or "because the decision poses a direct obstacle to the realization of important objectives embodied in other laws;" or (3) Whether the precedent is "outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 109 S.Ct. at 2371 (citations omitted). Each of these tests will be applied to *Roe v. Wade* below.

A. *ROE V. WADE* HAS BEEN UNDERMINED BY SUBSEQUENT CHANGES AND DEVELOPMENT IN THE LAW.

Contributing to the undermining of *Roe* is the fact that, while claiming to follow *Roe*, this Court has systematically gutted *Roe* in order to provide for the desired result. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent."). The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, the Court's appeal to stare decisis is now an appeal only to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

However, the undermining of *Roe* in *Roe's* progeny takes a secondary place to the important changes heralded by the decisions in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989), and *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986).

1. *ROE* HAS BEEN UNDERMINED BY *WEBSTER V. REPRODUCTIVE HEALTH SERVICES.*

The most profound change in abortion jurisprudence came when this Court decided *Webster*. Supreme Court Justice Oliver Wendell Holmes, Jr. declared that the state of the law is nothing more than a prediction of what the courts will do. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). This is an insight impressed upon modern jurisprudence by the philosophical school of legal realism. Employing this analysis, one may readily determine the state of abortion law by examining the opinions of members of the new *Webster* majority in prior abortion cases and in *Webster*. The evidence indicates that a significant, de facto alteration has occurred in the state of abortion law. Several aspects of *Webster* undermine *Roe* and its progeny.

First, the alteration of abortion jurisprudence is apparent in the fact that the challenged provisions of the Missouri abortion law were all upheld. The provisions had all been declared unconstitutional by the Eighth Circuit Court of Appeals and would have been declared unconstitutional by the four member dissent in *Webster*. 109 S.Ct. at 3068 n.1 (Blackmun, J., dissenting).

This willingness to uphold life-protective laws is a dramatic change from this Court's prior pattern of striking down virtually every meaningful regulation of abortion. This new willingness to uphold state efforts to protect unborn human life signals a *sub silentio* reversal of the extreme results and hostility to virtually any abortion regulation which were evident in the Court's most recent abortion decisions, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

Second, the alteration of abortion jurisprudence is evident in the disappearance of majority support for the trimester scheme set up in *Roe*. This decision results in a de facto reversal of that scheme, along with its viability line for protection of unborn life. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)("I . . . remain of the views I expressed in my dissent in *Akron*. The State has compelling intersts in ensuring maternal health and in protecting potential human life . . . throughout pregnancy."). With Justices Rehnquist, White, Scalia and Kennedy declaring the same view in *Webster*,[3] five justices have now recognized that a state's interest in protecting unborn human life does not become compelling *only* after viability, but exists throughout pregnancy. Likewise, the line between first and second trimesters, where *Roe* said the states' interest in maternal health becomes compelling, is now meaningless.

Third, the de facto shift in abortion jurisprudence may be seen in Justice O'Connor's argument that the Missouri viability testing requirement was compatible with *Akron* because it did not "unduly burden" a woman's right to abortion. *Webster*, 109 S.Ct. at 3062-64. This unduly burdensome or "absolute obstacle" test, which she championed in *Akron* and under which she felt the *Akron* ordinances could be upheld, was rejected by the *Akron* majority which struck down the *Akron* ordinances she approved. *Akron*, 462 U.S. 420 n.1. With four other justices now willing to go even further in *Webster* than was Justice O'Connor, it is clear that the absolute obstacle test now is the resulting standard among the majority. Thus, for the time

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[3] Justice Scalia would reverse *Roe* outright in *Webster*, holding that there is no fundamental constitutional right to abortion. However, if such a right is maintained, it is assumed he would agree that the state has countervailing compelling interests.

being, it will be the de facto standard of review for abortion statutes. A review of Justice O'Connor's *Akron* and *Thornburgh* dissenting opinions reveals that many state regulations of abortion will pass muster under her analysis.[4]

At present, four justices of the new majority will scrutinize abortion statutes using a rational basis test, the Court's lowest level of scrutiny. Justice O'Connor has no problem with this standard of review, except in the cases where the legislation is an absolute obstacle or a "severe limitation" to obtaining an abortion. While the scope of this test is not yet fully fleshed out, the practical result is that *Roe* has been substantially modified and much legislation to protect unborn life will be permitted.

Fourth, another aspect of the de facto shift in abortion jurisprudence is closely related to the previous one. It involves the nature of the woman's interest in abortion itself, which governs the standard of review. Under the usual analysis, if one has a "fundamental right," the state must show a "compelling interest" to regulate it. That standard is almost impossible to meet, making regulation of fundamental rights virtually

[4] In *Thornburgh*, Justice O'Connor stated her absolute obstacle analysis as follows:

> I . . . remain of the views expressed in my dissent in Akron. The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist throughout pregnancy. Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an undue burden on the abortion decision. An undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision, not wherever a state regulation may inhibit abortion to some degree. And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes necessary to apply an exacting standard of review, the possibility remains that the statute will withstand the stricter scrutiny. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting, joined by Rehnquist, J., in her opinion)(internal quotation marks and citations omitted.).

impossible for the state to do. However, if one only has a "liberty interest," a state need only demonstrate a "rational basis" for its regulations — a much simpler task, allowing states to extensively regulate it.

The *Webster* plurality declared that a woman has only a liberty interest in abortion under the Fourteenth Amendment, not a fundamental right to abortion as *Roe* held. *Webster*, 109 S.Ct. at 3058. Justice Scalia concurs that there is no fundamental right to abortion. *Id.* at 3064-67. Justice O'Connor, by her advocacy of the rational basis standard of review in most cases, concurs, as well, that there is no general fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right (for she would employ the compelling interest standard in such cases). She made an assumption, *arguendo*, in *Akron*, where she said, "Even *assuming* that there is a fundamental right to terminate pregnancy *in some situations*, there is no justification in law or logic for the trimester framework . . . ." *Id.* at 459 (emphasis added).

Thus, five justices now agree that, at a minimum, there is no *general* fundamental right to abortion; in most cases, there is only a liberty interest. Four would hold that there is no fundamental right to abortion in any situation. Of course, as noted above, five justices now find that states have the compelling interests — in both unborn life and maternal life — necessary to allow states to regulate abortion.

Fifth, another aspect of the de facto shift in abortion jurisprudence exists with regard to the "narrowly tailored" test in *Roe*. The *Roe* Court indicated that to regulate a woman's fundamental right to abortion a state must show (1) that it has a compelling interest in doing so and (2) that any such regulation is narrowly tailored to effect only that compelling interest. *Roe*, 410 U.S. at 155. Thus, the standard of review for state regulations impinging upon the declared fundamental right to abortion has been widely thought to consist of these two prongs. But Justice O'Connor wrote in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analysis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle" be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting)(citations omitted, case names not italicized in original).

This "reasonably related" test is significantly easier for a state to meet than the "narrowly tailored" test, as Justice O'Connor proceeded to demonstrate in *Akron*. *Id.* With her fellow Justices in the *Webster* majority prepared to go farther, this reasonably related test is now the de facto second prong in the new standard for reviewing abortion laws which will come before the Court.

The practical result of all these changes is that — at a minimum — *Akron* and *Thornburgh* are now dead letters. Things declared unconstitutional in those cases — which Justice O'Connor declared constitutional under her analysis (such as informed consent requirements) — may now be found constitutional.

That the new alliance on the Court portends great changes in *Roe* seems clear enough to the *Webster* dissenters. Justice Blackmun, after reading his opponents' opinions and counting the votes in *Webster*, says he fears for the future. He observed the danger in which *Roe* has been placed:

> It is impossible to read the plurality opinion and especially its final paragraph, without recognizing its implicit invitation to every State to enact more and more restrictive

> abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality's non-scrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law.

Webster, 109 S.Ct. at 3077.

The chief flaw in Justice Blackmun's *Webster* analysis is that *Roe's* demise is not prospective only. In *Webster*, a de facto reconsideration and partial reversal of that ill-fated decision has already occurred.

2. *ROE* HAS BEEN UNDERMINED BY *MICHAEL H. V. GERALD D.* AND *BOWERS V. HARDWICK*.

The Court has recently clarified the fundamental rights analysis and this clarification undermines the fundamental rights analysis in *Roe*. In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), the Court, examining the history of state regulation of sodomy, concluded that there was no fundamental right to commit sodomy. Yet, the historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy. The *Roe* majority cited Plato's *Republic* as evidence of abortion's deep roots in our cultural traditions. 410 U.S. at 131. The *Bowers* majority apparently did not deem this sort of evidence as worthwhile. 478 U.S. at 193-94 (no mention whatsoever of instances in ancient texts where the practice of homosexuality is condoned). Plato's dialogues contain numerous allusions to the practice of homosexual sodomy among the ancients. *See* Plato, *Phaedrus;* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 180, 240 (1989).

The test used in *Bowers* was a historical one, that is, whether such conduct is "deeply rooted in this Nation's history and tradition." 106 S.Ct. at 2844 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., concurring)). Finding that homosexual sodomy had long been regulated by the states, the

Court concluded that it did not constitute a fundamental right. *Id.* at 2844-46.

A more recent case is *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989). In it the Court considered whether a biological father (who is adulterous) has a constitutional right to visit his child born in an intact marriage. Using the historical test of *Bowers*, the Court held that there is no fundamental right to visitation in such a case, because states have historically presumed that a child born within a marriage is the product of that marriage and rejected visitation claims by adulterous fathers.

Under the historical analysis test for determining whether proposed rights are fundamental, endorsed by the five justices who have expressed opposition to *Roe*, a fundamental right to abortion cannot be found in the United States Constitution. This is true even though more than half of the majority opinion in *Roe* was given to the history of abortion. The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means. 410 U.S. at 132-39.[5] Means' history of abortion was neither objective nor accurate.[6]

Had this historical test for fundamentality been scrupulously applied in *Roe*, no right to abortion could have been found. This being true, *Roe* should be revisited.

Roe has been undermined by subsequent changes and development in the law. Ironically, this is true both in those decisions which expand the abortion right beyond *Roe*, and in the decision in *Webster* which permits the states to restrict that right. Thus, *Roe* should be reconsidered.

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[5] The majority cited Means seven times during its depiction of the history of abortion — without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[6] *See* Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, filed herein.

B. *ROE V. WADE* IS A POSITIVE DETRIMENT TO COHERENCE AND CONSISTENCY IN THE LAW.

The second test enunciated in *Patterson* is whether a precedent is a "positive detriment to coherence and consistency in the law." 109 S.Ct. at 2371. This test has two possible grounds: (1) inherent confusion is "created by an unworkable decision", or (2) the decision "poses a direct obstacle to the realization of important objectives embodied in other laws." *Id.*

1. *ROE V. WADE* IS AN UNWORKABLE DECISION WHICH HAS CREATED INHERENT CONFUSION IN THE LAW.

Roe v. Wade was intended to settle the issue of abortion in American law. However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. This fact is evident in *Roe's* progeny, which have produced a growing body of intricate and arbitrary, judicially-created regulations surrounding the abortion decision. For example, a state may require second trimester abortions to be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but may not require that they be performed in hospitals, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983). A state may require a physician to assure that certain information be provided to a pregnant woman, *Akron*, 462 U.S. at 448, but may not require that the doctor himself provide the information. *Id.* at 449. The quantum of information a state may require to be provided has been severely circumscribed. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 765 (1986). Prior to the decision in *Webster*, this Court struck down any meaningful attempt to codify the restrictions allowed in *Roe* and abandoned key elements of the *Roe* formula when convenient. Far from settling the debate, these subsequent decisions have multiplied confusion and spawned further unanswered questions.

It is clear, then, that, while the pro-*Roe* majority has raised the cry of stare decisis in prior cases upholding *Roe*, it has not followed its own precedent, except in the most skeletal fashion.

Illustrations abound in prior cases and include, but are not limited to, the following important developments: (1) The erosion of *Roe's* "bright line" trimester analysis; and (2) The ignoring of the physican consultation requirements. *Gary-Northwest Ind. Women's Serv. v. Orr*, 451 U.S. 934 (1981); *Akron*, 462 U.S. at 448.[7]

The inherent confusion in the law as a result of *Roe* can be illustrated in reference to four considerations: the trimester medical criteria, physician discretion, informed consent, and records. The medical criteria employed in the *Roe* trimester scheme were faulty and inadequate as a basis for a constitutional right. The unfettered discretion and deference afforded physicians in the abortion context is anomalous in light of the extensive regulation of medical practice. *See* Bopp & Coleson, *supra*, at 285. The treatment of the informed consent doctrine in the abortion context is out of step with the current trend of the law and regresses to a widely rejected model of the physician-patient relationship. *Id.* at 291. Even reasonable recording and reporting requirements have been struck down. *Id.* at 297.

The Court in *Roe* decided that the state could not regulate abortion in the first trimester, as abortion was considered safer than continuing the pregnancy during that period. *Roe*, 410 U.S. at 149, 163. In reaching this conclusion, Justice Blackmun referred to medical data from the appellant and amicus briefs.[8] The studies cited supported the proposition that abortion was safer during this period. 410 U.S. at 149. However, a review of opposing amicus briefs reveals contradictory data ignored by the Court. *See* Brief for Certain Physicians, Professors and

[7] For a more complete discussion and further illustrations of stare decisis abuse, *see* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 180, 201-10 (1989).

[8] *Id.* at 330. The Court's trimester scheme should not be confused with the medical division of pregnancy into three three-month periods. *See* Wolfe v. Schroering, 388 F. Supp. 631, 635 (W.D. Ky. 1974), *aff'd*, 541 F.2d 523 (6th Cir. 1976); Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67, 139-42.

Fellows of the American College of Obstetrics and Gynecology at 33-50, *Roe v. Wade*, 410 U.S. 113 (1973); Brief for Robert L. Sassone at 25-36, *Roe v. Wade*, 410 U.S. 113 (1973). The Court gave undue deference to certain segments of the medical community over others. Moreover, the asserted facts were in reality only opinions of certain medical groups. *See* Bopp & Coleson, *supra*, at 283-84. Subsequent articles and studies have supported the argument that the *Roe* Court's medical fact was really ill-founded medical opinion.[9] The *Roe* Court's exteme deference to such opinions, and to what were basically legislative facts, was unwarranted. With this foundation removed, the first trimester rule is without basis. Moreover, as medical technology changes, the relative safety of abortion and childbirth will remain a mobile guideline.

The *Roe* Court also relied on medical factors in drawing the line between the second and third trimesters, which was placed at viability. At viability, the state's interest in fetal life was to become compelling. *Roe*, 410 U.S. at 160. However, determining viability is a difficult task, leaving legislatures with an almost insurmountable task in asserting their declared compelling interest in fetal life and doctors in the precarious position of having possible criminal penalties flow from an erroneous judgment of nonviability. The result has been more litigation, resulting in a wide berth being required of legislatures when legislating around the point of viability, and virtually unchallenged discretion being allowed physicians in

[9] *See* Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion* 69-91 (T. Hilgers, D. Horan & D. Mall eds. 1981) (application of more accurate formulas produced a finding that natural pregnancy is safer than legal abortion in both the first and second twenty weeks of pregnancy). *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1295-1303 (1975).

making the determination of viability.[10] As with the line between the first and second trimesters, the viability line is a function of advances in medical technology. This fact renders *Roe* an unworkable decision creating inherent confusion in the law.

2. *ROE V. WADE* POSES A DIRECT OBSTACLE TO THE REALIZATION OF IMPORTANT OBJECTIVES EMBODIED IN OTHER LAWS.

Roe v. Wade poses a direct obstacle to the realization of important objectives embodied in other laws which recognize and protect unborn human life. If *Roe* were taken seriously in these other contexts, no recognition or protection of unborn human life would be possible. However, where the abortion choice is not in issue, the courts have rejected the *Roe* rationale. Examples include the rights of the unborn in tort law, wrongful death actions,[11] in equity,[12] in criminal law[13] and in laws relating to respect.[14]

[10] *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 63-65 (1976). *Danforth* stressed the flexibility of the *Roe* viability concept in upholding abortion legislation. *Id.* at 65. In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court struck down a state statute very similar to *Danforth's*. The fatal flaw was vagueness. *Id.* at 393. It is ironic that attempts to make the viability concept more definite have been struck down as too restrictive, while the formula, or very similar ones, used by the Court are inherently vague. The result is that little protection of the compelling state interest in fetal life is extant. The testimony in *Danforth* produced a wide range of definitions of viability. *Id.* at 396 n.15. See generally, Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. Sch. L. Rev. 1221 (1982).

[11] Bopp & Coleson, supra note 7, at 250.

[12] Id. at 261.

[13] Id. at 268.

[14] Id. at 281.

The most dramatic illustration of the anomalies of abortion jurisprudence can be seen in the evolution of fetal rights in tort law in the past ninety years. The rights of the unborn child have moved from a position of little legal protection to a position where even preconception wrongs are recompensible. As duties to the fetus increase, the foundation upon which *Roe* sits erodes, turning it into the exception rather than the rule in defining the personhood of the fetus.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus.[15] He held that "the unborn child was a part of the mother at the time of injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts" occurred. W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.D.C. 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken, as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The reasoning in *Bonbrest* stated:

> As to the viable child being 'part' of its mother — this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in

[15] The fetus lived for "ten or fifteen minutes" after premature birth. *Dietrich*, 138 Mass. at 15. Nevertheless, the court referred to the newborn as an "unborn child." *Id.* at 17

> the sence of a constituent element — as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140. As to the difficulty of proof of such claims, the court stated: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884. We are concerned here only with the right and not its implementation." *Id.* at 143.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Compensation for prenatal injuries has also been allowed under the Federal Tort Claims Act in an action against the United States. *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960). A cause of action for prenatal injuries under 42 U.S.C. Sec. 1983 (1970) was recognized in *Douglas v. Town of Hartford*, 542 F. Supp. 1267 (D. Conn. 1982). The Court held that, for purposes of Sec. 1983, a fetus was a "person" within the meaning of the statute. *Contra*, *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981)(decided on virtually identical facts); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part*, 516 F.2d 898 (5th Cir. 1975); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973). *See generally*, Note, *Douglas v. Town of Hartford: The Fetus as Plaintiff Under Section 1983*, *35 Ala. L. Rev. 397 (1984)*; Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 Syracuse L. Rev. 1029 (1983). Some states limit recovery to post-viability injuries, but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton*, *supra*, at 368-369; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970).

The justifications given for discarding the viability test vary. In *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), the New Jersey Supreme Court found that age is not the only determinant of viability, and, in borderline cases, there is no principled way to determine viability. *Id.* at 367, 157 A.2d at 504. The court said:

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. Whether viable or not at the time of the injury, the child sustains the same harm after birth and therefore, should be given the same opportunity for redress.

Id. A New York appellate court in *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (the first court to reject the viability standard) focused on the issue of biological separability: "[L]egal separability should begin where there is biological separability." *Id.* at 543, 125 N.Y.S.2d at 697. Here, as in other related areas of the law, medical science empowered the engine for legal change. The court noted such knowledge, especially that dealing with fetal development, as a factor in helping to lead to this rule. *Id.* at 543-44, 125 N.Y.S.2d at 697-98.

The Supreme Court of Rhode Island has dropped the viability test in favor of a causation test: "With us the test will not be viability but causation, and our inquiry will be whether the damage sustained is traceable to the wrongful act of another." *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966). This causation test seems more rational and logical than a viability test, which has been criticized as arbitrary and transient. *See, e.g.*, Morrison, *Torts Involving the Unborn — A Limited Cosmology*, 31 Baylor L. Rev. 131, 141-144 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401, 1414-1420. The disallowance of claims for injuries in the first trimester may well be the denial of the most meritorious and seriously harmful claims. Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 589 (1965). Though causation may be difficult to

determine, most courts seem to realize that such difficulty should not be a bar to the action, but something to be handled in the courtroom. Recent medical advances make proof of medical causation increasingly reliable.

Roe and its analysis stands in stark contrast to the recognition of fetal rights in other areas of the law. Although some courts have utilized *Roe* to deny fetal rights, most courts have rejected the *Roe* rationale in order to affirm the personhood and legal rights of unborn persons in areas not invòlving abortion rights, and thus not burdened by the *Roe* Court's abortion distortion. In this way *Roe v. Wade* continues to be a positive detriment to coherence and consistency in the law.

C. *ROE V. WADE* IS OUTDATED AND IS INCONSISTENT WITH THE SENSE OF JUSTICE AND THE SOCIAL WELFARE.

The third test in *Patterson* to determine when a decision should be reconsidered is whether the precedent has become "outdated" and, after being "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." *Patterson*, 109 S.Ct. at 2371. Many of the foregoing arguments could be reiterated in regard to *Roe* as an outdated doctrine. In addition to those arguments, there are five illustrations of this inconsistency: (1) the rejection of *Roe* in scholarly analysis and political activity; (2) the use of *Roe*, in practice and in law, to justify discrimination against the unborn in general, and those with disabilities in particular; (3) sex selection abortions; (4) the fetus as patient; (5) public opinion against abortion on demand; and (6) abortion as the exception which swallows all rules.

First, the inconsistency of *Roe* with the sense of justice and social welfare is illustrated by the political activity, scholarly analysis, and public opinion which rejects *Roe* as settled law. Since *Roe*, nearly 900 separately numbered resolutions relating to abortion have been introduced into Congress.[16] Over 300 are joint resolutions seeking Constitutional amendments that would overturn *Roe*.[17] Congress has also acted broadly to remove direct federal financial support for abortion.[18] Moreover, a 1988 Presidential proclamation declared the unborn to be protected under the Constitution, and directed the executive branch to carry out actions and programs consistent with that declaration.[19]

The strongest evidence of a popular rejection of the abortion right created in *Roe* is seen in the vast number of state legislative actions and public referenda designed to limit or regulate the performance of abortions. During the 1988 elections, public referenda in Michigan, Arkansas, and Colorado affirmed restrictions on abortion, and in Arkansas, granted rights to the unborn under the state constitution.[20] During the years since *Roe*, state legislatures from all regions have enacted hundreds of laws regulating abortion.[21] At least 23 state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution, and 19 state legisla-

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[16] Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 247, *citing*, Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle) (600 resolutions, 1973-1985). Since 1985, over 300 more resolutions have been introduced. See Statistics prepared by Legislative Information Service, United States Senate, as of February 10, 1989.

[17] *See* Wardle, *supra* note 16, at 247-248, n.86, 270 (1973-85).

[18] *Harris v. McRae*, 448 U.S. 297 (1980); *Bowen v. Kendrick*, 108 S.Ct. 2562 (1988). *See also*, 42 U.S.C. Sec. 1396 et seq. (1982 ed. and Supp. IV) ("Hyde Amendment" restricting Medicaid funding of abortion); 42 U.S.C. Sec. 300-300a-6a (1982 ed. and Supp. IV); 42 U.S.C. Sec. 300z *et seq.* (1984) (Adolescent Family Life Act).

[19] Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

[20] Wash. Post, Nov. 13, 1988, at C6, col. 1.

[21] Bush, *Fertility-Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111, 111 (Table 1) (1983). Wardle, *supra* note 16, at 247 n.83.

tures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[22] The democratic branches of government, therefore, have not accepted or endorsed *Roe*.

In academic circles, few if any opinions of this Court have attracted the barrage of criticism levied at *Roe*.

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. . . . Even some who approve of *Roe's* form of judicial review concede that the opinion itself is inscrutable.[23]

Nor has *Roe* exhausted its critics, for the stream of published criticism continues to this day.[24] *Roe* remains vulnerable because it was inherently flawed from the outset,[25] and because the error has compounded itself, as subsequent case law proves.

Second, *Roe* has encouraged discrimination against the unborn in general and those with disabilities in particular.

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[22] Wardle, supra note 16, at 247.

[23] Morgan, *Roe v. Wade and the Lessons of Pre-Roe Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979) (footnotes omitted).

[24] *See, e.g.*, Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v Wade?*, 15 J. CONTEMP. L. 131, 134, (1989) ("A consensus has developed that, whatever one thinks of the holding, the analysis was inadequate."); Bopp & Coleson, *supra* note 7; Wardle, *supra* note 16; Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L.J. 267, 281 (1986); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 1985 N.C.L. Rev. 375; Note, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 U.C.L.A. L. Rev. 1195 (1982). While not all these articles suggest reversal of *Roe* as the solution, they illustrate the continued difficulty of adhering to *Roe's* standards.

[25] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 932, 935-936 (1973).

Discrimination against the unborn in general is illustrated by the reasons given by women who have secured abortions. Each year, since the late 1970s, approximately 30 percent of all pregnancies in the United States have ended in abortion (miscarriages excluded). Torres and Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 169 (1988). In 1988, the Alan Guttmacher Institute published the results of a survey of abortion patients addressing the question of why women choose to have abortions. In all, 1,900 women responded to the questionaire with usable information. Most women cited more than one reason for aborting. The results show that 76 percent of the women were concerned about how a baby could change their lives, 68 percent felt they couldn't afford a baby now, 51 percent had problems with their relationship to the fathers or wanted to avoid single parenthood. *Id.* at 170. These are the percentages of women reporting that these reasons, respectively, were most important to them in deciding to abort. Only 7 percent of the women cited health problems (not necessarily life threatening), and only 1 percent cited rape or incest as the most important reason for aborting. *Id.*

From this information, it is clear that abortion, in practice, is used instead of birth control in the overwhelming majority of cases. Maternal health problems are at the bottom of the list. Social and economic problems, real or imaginary, are at the top of the list. Such invidious discrimination against human beings would not be tolerated elsewhere in the law. Yet this discrimination is the worst kind because it results in the death of those discriminated against. Causing the death of another human being, for less than grave reasons, violates our sense of justice.

Further, *Roe* has resulted in specific discrimination against unborn humans with disabilities. This result occurs due to the wave of wrongful birth/wrongful life causes of action recognized by various courts since *Roe*. Wrongful birth actions hold physicians and other health care professionals liable for failure to test for birth defects and to advise the parents that they could abort the child, if the child tests positive. The parents claim

that they would have aborted the child if they had been properly advised. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 461-62 (1989). Wrongful life actions are similar, except that the action is brought by a child with disabilities, who claims that his life is wrongful since his parents were denied their right to abort him. *Id.*

Prior to the 1973 decision in *Roe*, wrongful birth/life actions were unsuccessful due to the prevailing public policy against abortion. *Id.* at 467. With the *Roe* Court's enunciation of a woman's privacy right which protected the abortion decision from state criminal prosecution, wrongful birth claims were recognized by some courts on the theory that the negligence of the health care provider had infringed this private, protected choice. Commentators are nearly unanimous in concluding that *Roe* provided the legal springboard for the wave of wrongful birth actions that subsequently appeared. This conclusion is supported by the language and citations to *Roe* found in the decisions which recognized the new cause of action. *Id.*

One of the most important results of holding physicians and others liable for failure to advise of the presence or possibility of birth defects is that they are forced to practice "defensive" medicine. Such potential liability creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particularly cautious physician. An increase in prenatal testing in turn results in more abortions, both of nondisabled fetuses because of false postitive test results, and fetuses with disabilities (the extent of which are frequently unknown and unpredictable) because the fetus does not meet the couples standard of perfection. *Id.* at 485-92.

This *Roe*-engendered discrimination against fetuses with disabilities stands in stark contrast with public policy regarding such persons after birth. State public policies are commonly protective of persons with disabilities regarding the

provision of health insurance and education programs. *Id.* at 494. Federal policy likewise encourages the care and education of persons with disabilities as reflected in the Education of the Handicapped Act, 20 U.S.C.A. Sec. 1400-85 (West Supp. 1988), the Child Abuse Amendment of 1984, 42 U.S.C.A. Sec. 5101-03 (West Supp. 1988), the provision of grants to states that offer free public education to disabled children, 20 U.S.C.A. 2771-72 (West Supp. 1988), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Sec. 794 (West. Supp. 1988).

Against the backdrop of policy protecting citizens with disabilities, recognition of wrongful birth/life claims creates a jurisprudential contradiction: a legal system that at once encourages the destruction of "defectives" before birth and seeks to protect those lives after birth. Rosenblum & Grant, *The Legal Response to Babies Doe: An Analytical Prognosis*, 1 Issues in Law & Med. 391 (1986). This result, traceable directly to *Roe*, is inconsistent with the sense of justice and the social welfare.

Third, another illustration of how *Roe* is inconsistent with the sense of justice and social welfare is the rise of sex selection abortions. "There are no national data on the number of prenatal diagnoses done for sex selection, nor on the number of women who terminate pregnancies because of the sex of the fetus. But every one of more than a dozen geneticists interviewed said they regularly receive requests for prenatal diagnosis for sex selection." Kolata, *Fetal Sex Test Used as Step to Abortion*, The New York Times, Dec. 25, 1988, at A1.

On the one hand, a recent survey found that 34% of 295 United States geneticists surveyed would perform prenatal diagnosis for sex selection abortions and 28% would refer couples to someone who would perform it. *Ethics and Medical Genetics in the United States: A National Survey*, 29 Am. J. Med. Genetics 815 (1988)(cited in Wertz & Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, Hastings Center Rep., May/June 1989, at 21). On the other hand, a survey by the Boston Globe revealed that 93% of Americans think that

sex selection abortions should be illegal. *Most in U.S. Favor Ban on Majority of Abortions, Poll Finds* The Boston Globe, Mar. 31, 1989, at A1.

This type of selection process is not dissimilar to shopping for goods in order to find the desired size, shape and color. If sex selection abortions are consistent with the sense of justice and the social welfare, why not selection for eye or hair color, height or weight. If fetuses are not human lives, are they merely goods to be thrown away if failing to meet some predetermined set of arbitrary quality standards? This amounts to consumer genetics, an extreme devaluation of human life.

Fourth, in stark contrast to the consumerist view is the modern view of the fetus as patient. In the last few decades medical technology has advanced to the the point where visualizing, monitoring and measuring fetal activity is possible. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 Am. J. L. & Med. 1, 15-16 (1983). Due to these advances, the fetus is not only capable of being monitored, but treated by physicians for certain conditions prior to birth. Treatments include medicines administered orally to the mother, or directly into the amniotic fluid, as well as fetal surgery. Surgery can take place entirely within the uterus or after partial removal of the fetus from the uterus onto an open operating field. *Id.* at 16-17. Such advances in medical procedure and care given to unborn humans in need of medical treatment represents a sense of justice and social welfare lost in abortion on demand.

Fifth, prior to *Webster* it seemed that abortion jurisprudence had evolved into a right to abort without limitations. This occurred despite public opinion to the contrary. In a survey by The Boston Globe/WBZ, the following percentages of persons polled wanted abortion to be illegal in the respective circumstances: when the woman is a minor- 50%, wrong time in life to have a child- 82%, fetus is not the desired sex- 93%, financial difficulties- 75%, as a means of birth control- 89%, emotional strain- 64%, father unwilling to help raise the child- 83%, father

absent- 81%, mother wants abortion, father wants baby- 72%, and father wants abortion, mother wants baby- 75%. *Most in U.S. Favor Ban on Majority of Abortions, Poll Finds*, The Boston Globe, Mar. 31, 1989, at A1. Thus, for most of the reasons commonly given by women seeking abortions, *Roe*, as expanded by its progeny, is inconsistent with the public sense of justice and social welfare.

Sixth, *Roe* and its progeny are also inconsistent with the sense of justice and social welfare as revealed by the abortion distortion factor. *Roe* became the exception which swallows all rules in the sense that limitations common to other areas of the law were struck down where abortion was concerned. For example, in Justice Burger's dissent in *Thornburgh v. American Coll. of Obst.*, 476 U.S. 785 (1986), he states: "In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized." *Id.* at 782-83 (Burger, J., dissenting).

The examples cited by Justice Burger included the requirement of informed consent in the interest of protecting maternal health, *id.* at 783, in the requirement of a second doctor in order to protect the "potentiality of human life," *id.* at 784, and in the requirement of parental consent or court authorization for minors to receive abortions. *Id.* at 785. Thus, prior to *Webster*, *Roe* seemed to create an constitutional right to abortion which could not be limited in any reasonable fashion.

For all the above reasons, it may be concluded that reconsideration of *Roe* is required, because *Roe* is outdated, and is inconsistent with the sense of justice and the social welfare.

II. *ROE V. WADE* SHOULD BE REVERSED.

The reasons cited for reconsideration of *Roe* also stand in support of its reversal. The tangent set by *Roe's* unconstitutional departure from the norm has led abortion jurisprudence

far from the path of the rest of the law. A correction in the angle of the trajectory is required. The most direct and constitutionally defensible correction is the reversal of *Roe*.

As recently as 1985, Justice Blackmun, author of *Roe*, declared that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, the prior decision must be overruled. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 557 (1985). A Supreme Court refusal to overrule *Roe v. Wade* merely because it is claimed to be entrenched would be the ultimate illustration of the super-protected nature of the abortion right.

CONCLUSION

The three tests and sub-tests set out in *Patterson* for the reconsideration of a precedent are each and all met in *Roe v. Wade*, although only one test need be met. *Roe*, therefore, is thrice qualified for reconsideration. There is no merit in delaying it.

Wherefore, for the above reasons, these Amici respectfully request the Court to reconsider and, upon reconsideration, reverse *Roe v. Wade*.

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